IN THE SUPREME COURT OF MISSOURI

DARREN BERRY, et al.,	)	**Supreme Court No. SC92770**
	)	
Plaintiffs/Respondents,	)	**Court of Appeals No. WD73974**
	)	
v.	)	**Circuit Court No. 0516-CV01171-01**
	)	
VOLKSWAGEN GROUP OF AMERICA, INC.,	)	**Court of Appeal, Western District**
	)	
	)	**Circuit Court of Jackson County**
Defendant/Appellant.	)	**at Independence**
	)	

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with approximately 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 975 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.[1]

PLAC's members are interested in this case because they are concerned about potential windfall awards to class counsel under fee-shifting provisions such as in the Missouri Merchandising Practices Act. PLAC's members are also interested in this case because the Court has an opportunity to promote predictability and clarity in the law, facilitate settlements, and incentivize legitimate but not meritless litigation. PLAC urges the Court to adopt the reasoning in recent decisions from the United States Supreme Court and the Western and Eastern Districts holding that an attorney's fee award

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[1] PLAC's corporate membership list is attached as Appendix A.

calculated under the "lodestar" method (rate times hours worked) is presumed to be a reasonable attorney's fee unless "rare" and "exceptional" circumstances exist, as is the case here, where the exceptionally small class recovery requires a substantial reduction in the lodestar to bear "some relation" to the amount recovered, as required under Missouri law.

CONSENT OF PARTIES

Counsel for Defendant/Appellant Volkswagen Group of America, Inc. ("Volkswagen") consented to the filing of this brief but Class Counsel for Plaintiffs/Respondents did not.

JURISDICTIONAL STATEMENT

PLAC adopts Volkswagen's Jurisdictional Statement.

STATEMENT OF FACTS

PLAC adopts Volkswagen's Statement of Facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Missouri Merchandising Practices Act ("MMPA") provides that in an MMPA class action "the court may in its discretion order…reasonable attorney's fees." R.S. Mo. § 407.025.2. The central issue in this appeal is whether the fee awards below, nearly fifty times the class recovery at the trial level and approximately twenty-five times the class recovery after a reduction by the Western District, are "reasonable attorney's fees" under the governing law.

The trial court approved an astonishing $6,174,640 fee award (plus $550,00 in expenses and assessed court costs against Volkswagen) for Class Counsel's work to

obtain $125,261 in actual recoveries for an MPPA class under a settlement claims reimbursement program related to Volkswagen Jettas, Golfs, GTIs and Cabriolets (A3 platform vehicles) sold between 1995 to 1999 with allegedly defective window regulators.[2] The MMPA class action was certified after the trial court denied Class Counsel's request to certify a nationwide warranty class action.

The trial court's fee award included amounts billed by Class Counsel for work on the failed nationwide class action, and a multiplier which doubled the $3,087,320 base lodestar fee[3] to $6,174,640 to account for the suit's "potential benefit," as claimed, but never properly proved, by Class Counsel.

In the Western District, Volkswagen argued that the lodestar, with or without the trial court's 2.0 "multiplier," was grossly disproportionate to the actual recovery, contrary

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[2] The widow regulator is the assemblage of mechanical components, located just inside the outer skin of the vehicle, which holds the window glass in place and moves it up or down in response to input from the window motor or hand-operated window crank.

[3] Under a "lodestar" approach, reasonable attorney's fees are calculated by multiplying the number of hours reasonably expended in the prevailing party's legal representation by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983). The United States Supreme Court has recently described the lodestar amount as a fee "that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010).

to *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1993), and its progeny, and thus took no account of the failed nationwide class action, the denial of which guaranteed no recovery for over ninety-eight percent of the putative class on whose behalf this action was brought. Volkswagen also argued that the multiplier was unjustified because this case does not involve exceptional circumstances demanding an enhancement to the lodestar fee. In addition, Volkswagen argued that the "potential benefit" to the class was an improper factor to consider in determining Class Counsel's degree of success in the MMPA suit, because the only benefit conferred on the class was the amount actually recovered ($125,261). Class Counsel argued that the entire inflated fee award was within the trial court's discretion.

The Western District essentially gave Class Counsel a little more than "half a loaf," upholding the $3,087,320 base lodestar fee without independent analysis, but concluding that a multiplier was unjustified. *See Berry v. Volkswagen Group of Am., Inc.*, - S.W.3d --, 2012 WL 2094490 (Mo. App. W.D. June 12, 2012). In support of its holding that the base lodestar amount was a reasonable fee, the court adopted the reasoning of very recent decisions by the United States Supreme Court and the Eastern District as to the appropriateness of applying multipliers to lodestar fees. *See Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010); *Zweig v. Metropolitan St. Louis Sewer District*, 2012 WL 1033304 (Mo. App. E.D. Mar. 27, 2012).

On appeal to this Court, Volkswagen seeks a reduction in the lodestar amount to account for the failed nationwide class action and clarification as to the appropriateness of fee adjustments, either upward or downward, *see Hensley v. Eckerhart*, 461 U.S. 424,

434 (1983), in cases such as this one. Class Counsel seeks to reinstate the multiplier, objecting to the Western District's decision to follow recent precedent holding that the lodestar is presumed to a reasonable attorney's fee unless rare and exceptional circumstances exist that call for an adjustment – either upward (not present here) or downward (clearly present here).

Missouri cases, consistent with other authority around the nation, make it clear that an attorney's fee "should bear some relation to the award," *O'Brien*, 768 S.W.2d at 71 n.13, with "the most critical factor" being "the degree of success obtained." *Trout v. State*, 269 S.W.3d 484, 488 (Mo. Ct. W.D. 2008) (quoting *Hensley*, 461 U.S. at 436). Paying class counsel for failure as to all but a miniscule portion of the nationwide class relief sued for is unfair and rewards meritless litigation. The trial court abused its discretion in doing so.

In addition, PLAC argues that the appellate court was correct in finding that the trial court abused its discretion by awarding a lodestar multiplier. PLAC urges this Court to adopt the reasoning of the United States Supreme Court and the Eastern and Western District appellate courts and hold that the lodestar is presumed to be a reasonable fee in cases such as this one unless there are rare and extraordinary circumstances. As Volkswagen argues, this is a rare and extraordinary case in which that adjustment must be downward and substantial to maintain "some relation to the award." *O'Brien*, *supra*. This approach would encourage settlements, provide trial courts with a clear and easy to apply rule, and provide an adequate incentive for plaintiffs' lawyers to bring meritorious MMPA claims consistent with the MMPA's goal of deterring consumer fraud.

PLAC further argues that the Court should clarify that "potential benefits" to class members should not be considered in pure claims-made settlements, where the only value to be considered is the relief actually recovered by the class members.

Finally, PLAC argues that this Court should reduce and remit the attorney's fee award to preserve the integrity of the civil justice system and avoid due process problems that may arise from arbitrary and excessive fee awards. If this Court fails to follow a rule of reasonableness in the award of statutory attorney's fees based on "the degree of success obtained," *Trout*, 269 S.W.3d at 488, it may invite intervention on the issue by the Missouri legislature and the United States Supreme Court, similar to what has occurred with respect to constitutional decisions limiting excessive punitive damages awards.

For these reasons, PLAC urges the Court to reduce and remit the attorney's fee award.

ARGUMENT

I. CLASS COUNSEL'S $3,087,320 BASE LODESTAR FEE—NEARLY TWENTY-FIVE TIMES THE $125,261 RECOVERED BY CLASS MEMBERS—SHOULD BE REDUCED BECAUSE THE FEE IS DISPROPORTIONATE TO THE DEGREE OF SUCCESS OBTAINED AND IS UNREASONABLE

The "starting point in determining the reasonableness of attorneys' fees" in cases such as this one is the lodestar (i.e., hours worked times the rate). *Alhalabi v. Missouri Dept. of Natural Res.*, 300 S.W.3d 518, 530 n.6 (Mo. App. E.D. 2009). The United States Supreme Court has also stated that the lodestar method carries a strong

presumption that it, alone, reflects reasonable attorneys' fees. *See Perdue*, 130 S. Ct. at 1673.

The leading case of *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d at 71 n.13, holds that even though there is no "established principle" that an attorney's fee may not exceed the damages awarded, "the fee should bear some relation to the award." "[T]he most critical factor is the degree of success obtained." *Trout*, 269 S.W.3d at 488 (quoting *Hensley*, 461 U.S. at 436); *accord Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 187 (Mo. Ct. W.D. 2002) ("An attorney's fees award must…bear some relation to the damage award."); *Knopke v. Knopke*, 837 S.W.2d 907, 922-23 (Mo. Ct. W.D. 1992) ("The degree of success…i.e., the amount recovered, is taken into account in the amount of attorneys fees awarded.") (citing *O'Brien*, 768 S.W.2d at 71); s*ee also Tusa v. Omaha Auto Auction, Inc.*, 712 F.2d 1248, 1255 (8th Cir. 1983) (finding an attorney's fee "too far out of proportion…to be considered reasonable.").

The trial and appellate courts below fundamentally erred by de-coupling the lodestar calculation from the "degree of success obtained." *Trout*, 269 S.W.3d at 488. Class Counsel initially sought certification of a nationwide class invoking a Michigan implied warranty theory, but the "degree of success" on that claim was zero. Courts may "award fees for losing arguments in support of prevailing claims, but not for losing claims." *Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992); *Knopke*, 837 S.W.2d at 922-23. The fee endorsed by the courts below was not reduced to reflect Class Counsel's failure to obtain certification of a nationwide class that would have been overwhelmingly larger and very different from the MMPA statewide class that was certified.

This Court should reduce the lodestar fee award to exclude time spent by Class Counsel pursuing a theory that was unsuccessful and bore no relation to the MMPA class that was certified. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (stating a "reasonable fee" is not intended to be a "form of economic relief to improve the financial lot of attorneys."). As a starting point, the $125,261 actually recovered under the settlement claims reimbursement program for members in the MPPA class is so disproportionate to counsel's claimed lodestar as to mandate a downward adjustment under *Hensley*, 461 U.S. at 434, which underlies the leading cases of this and other Missouri courts. *See, e.g. O'Brien*, *supra*; *Trout*, *supra.*

Defendants should not be forced to bear the cost of speculative and unsuccessful claims. To hold otherwise would encourage plaintiffs to pursue weak or frivolous claims with the knowledge that even if they obtain a recovery infinitesimally smaller than the one initially sought they will be rewarded for their win as well as their loss. This is neither fair nor sound public policy, and it should not be the rule in Missouri.

Further, the approach taken by the lower courts to "rubber stamp" the lodestar fee instead of focusing on the "amount recovered," *Knopke*, 837 S.W.2d at 922-23, in the MMPA class action is anti-consumer, because it will necessarily lead to higher prices for goods and services without any corresponding public benefit in terms of deterrence or compensation for actual wrongs. The only beneficiaries of such an approach are class counsel, but fee-shifting statutes were "never intended to produce windfall awards to attorneys." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

As the Ninth Circuit Court of Appeals recently explained: "[W]here the plaintiff has achieved 'only limited success,' counting all hours expended on the litigation—even those reasonably spent—may produce an 'excessive amount,' and the Supreme Court has instructed district courts to instead 'award only that amount of fees that is reasonable in relation to the results obtained." *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 942 (9th Cir. 2011) (quoting *Hensley*, 461 U.S. at 440).

II. THE APPELLATE COURT CORRECTLY HELD THAT APPLICATION OF A LODESTAR "MULTIPLIER" IS UNJUSTIFIED UNLESS RARE AND EXCEPTIONAL CIRCUMSTANCES EXIST, SUCH AS THOSE WHICH REQUIRE DOWNWARD ADJUSTMENT IN THIS CASE.

The trial court further abused its discretion and erred by doubling the lodestar fee, resulting in a fee award of $6,174,640—i.e,. fees of $1,300 per hour for lead counsel, $750 for an associate, and $392 for paralegals—despite the absence of rare or exceptional circumstances to support such an extraordinary award. The Western District correctly held that application of a lodestar multiplier was unjustified, adopting the reasoning of the United States Supreme Court in *Perdue* and the Eastern District in *Zweig.*

In *Perdue*, the Supreme Court determined that enhancements beyond the lodestar amount "may be awarded in 'rare' and 'exceptional' circumstances." 130 S. Ct. at 1673 (quoting *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565); *see also City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (referring to the lodestar analysis as the "guiding light of our fee-shifting jurisprudence…[and to the] strong presumption that the

lodestar represents the reasonable fee."). The Court identified three circumstances where an enhanced fee award may be justified: (1) "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"; (2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted"; and (3) "where an attorney assumes [various] costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." 130 S. Ct. at 164-75.

The Western District noted that the majority's reasoning in *Perdue* was adopted in *Zweig* by the Eastern District, which addressed the issue of a lodestar multiplier as an issue of first impression in Missouri. The *Zweig* court held that a lodestar was subject to a strong presumption that it represented a reasonable attorney's fee and that the lodestar should only be enhanced in "rare circumstances." 2012 WL 1033304, at *8.

The court appreciated that "[a]n enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Berry*, 2012 WL 2094490, at *6 (Op. at 10) (quoting *Perdue*, 130 S. Ct. at 1667). The court, like those in *Perdue* and *Zweig*, also noted that "many of the factors used by the trial court here to enhance the fee award are duplicative of the factor used to determine Class Counsel's lodestar." *Id*. Class Counsel's "hourly rate in the lodestar already reflects the 'experience, reputation, and ability' used to prosecute the case. *Id*. (quoting *Perdue*, 130 S. Ct. at 1672 n.4). "Likewise, the lodestar award of Class Counsel's hourly rate for time Counsel expended

already reflects that counsel has chosen the instant case over pursuing other cases, contingent and non-contingent alike." *Id.*

In addition, the appellate court correctly concluded that the instant case "does not reflect those 'rare circumstances' in which an enhanced fee may be justified." *Id.* The court explained that the lodestar did not fail to sufficiently compensate Class Counsel for their true market value, Volkswagen did not contest the expenses of Class Counsel, and the length of the litigation was not extreme given its complexity. *See id.* It should also be noted that Volkswagen's decision to "fight" was justified in light of Class Counsel's failure to obtain certification of a nationwide class action and by the comparatively small amount actually recovered by the MMPA class.

The Missouri courts should continue to apply the principles of *Hensley*, as articulated and applied in *O'Brien*, *Trout* and other cases, and also should adopt the reasoning in *Perdue*, as modified by the Missouri appellate courts, and hold that there is a strong presumption that the lodestar represents a reasonable fee in statutory fee-shifting situations. This presumption may be overcome where "rare" and "exceptional" circumstances, such as those in this case, require that the lodestar be substantially reduced to take account of the extraordinarily limited actual recovery. The Court does not need to anticipate all other extraordinary circumstances where lodestar amount should be adjusted upwards of downwards, since the (reduced) lodestar fee is commensurate with "the degree of success obtained." *Id.* (quoting *Trout*, 269 S.W.3d at 488).

This approach would encourage settlements, in stark contrast to the protracted and costly fee dispute that has occurred here, and provide trial courts with a clear and easy-to-

apply rule. The approach would also give plaintiffs' lawyers an adequate incentive to bring meritorious MMPA claims consistent with the statute's goal of deterring consumer fraud. In this case, for instance, Class Counsel's base lodestar fee was determined to be $3,087,320. If this were an ordinary personal injury case, the contingency fee would only be about one-third of the clients' $125,261 recovery, or about $42,000. The prospect of a full lodestar in all but the rare and exceptional case is all that is needed to incentivize competent counsel to pursue genuinely meritorious MMPA claims. The prospect of loss or de minimis recovery is always possible, but plaintiffs' attorneys can significantly reduce that risk by choosing to file cases that have both merit and value, and thus entail little actual contingency. Few cases are going to produce a totally, or almost totally "dry well," like this case, and it is questionable whether those that do should have been brought in the first place. Lawyers will continue to prevail, as they do today, in enough cases to be paid an enviable rate for their services even without a lodestar multiplier.

In addition, the *Perdue*-like approach adopted by the Western and Eastern Districts would help avoid potential conflicts between class counsel and their clients. Justice O'Connor, for example, stated that "there must be at least some rational connection between the fee award and the amount of the actual distribution to the class." *International Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (denying certiorari). "Among the concerns with not measuring the 'result' by the class's actual recovery are decoupling 'class counsel's financial incentives from those of the class,' and undermining 'the underlying purposes of class actions by providing defendants with a

powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class.'" *Berry*, 2012 WL 2094490, at *7 (Op. at 13) (quoting Justice O'Connor).

And, while this Court does not have to follow the decisions of the appellate courts, the fact that both the Western and Eastern Districts have very recently reached uniform conclusions in the area of lodestar fee multipliers deserves some respect. The Court is on solid ground following the consensus position of Missouri's appellate courts and the United States Supreme Court. If, however, the Court chooses to sail in a different direction it may be perceived as an "outlier" and undermine its own "moral authority."

The Missouri Association of Trial Lawyers argue in their *amicus* brief that "[t]he decision to impose a new, rigid standard for determining attorney fees under a Missouri fee-shifting statute will have far-ranging impact in the trial courts," *Amicus* Brief, at 3, suggesting the Western District's decision, *Perdue*, and *Zweig* "prohibit[] a fee that departs from the 'lodestar' method." *Id*. at 4. This is not what *Perdue* says, or what the Western or Eastern Districts held. Rather, the Western and Eastern Districts said that the three "exceptional" circumstances set forth in *Perdue* to justifying lodestar do "not appear to be an exhaustive list but only guidance as to what constitutes rare circumstances." *Berry*, 2012 WL 2094490, at *6 (Op. at 11) (quoting *Zweig*, 2012 WL 1033304, at *11 n.4).

Also contrary to the suggestion of the Missouri Association of Trial Lawyers that a "new, rigid standard" has been created, the Western District found support in traditional Missouri case law to conclude that, when determining whether "rare" and "exceptional" circumstances exist to enhance the base lodestar, "the most critical factor is the degree of

success obtained." *Id*. (quoting *Trout*, 269 S.W.3d at 488). Nothing new or rigid there. This Court should affirm the appellate court's ruling on this issue.

III. "POTENTIAL BENEFITS" TO CLASS MEMBERS SHOULD NOT BE CONSIDERED IN DETERMINING THE "DEGREE OF SUCCESS OBTAINED" IN CLAIMS-MADE SETTLEMENT.

This Court should also clarify that when trial courts consider "the degree of success obtained," *Trout*, 269 S.W.3d at 488, the "potential benefits" to class members should not be considered in pure claims-made settlements such as this one, where the only value to be considered is the relief actually recovered by the class members. The appellate court's ruling is muddied and sends a confusing message on this point.

The appellate court explained that Class Counsel sought an award approximately twenty-five percent of the "potential benefit" of the MMPA settlement, which Class Counsel self-servingly claimed was $23 million, without any proper evidentiary showing. The appellate court agreed with Volkswagen that "in this case the 'potential benefit' to the class of $23 million is not the measure of the degree of success obtained," *Berry***,** 2012 WL 2094490, at *7 (Op. at 11), noting that "[o]therwise, the award effectively rewards class counsel in a manner almost arbitrary to the relief afforded to the class." *Id*. at *7 (Op. at 13). "The court appropriately chose actual benefits recovered as opposed to claimed 'potential' value, observing that, '[as] many courts have recognized, to value a 'claims made' settlement at a one-hundred percent return rate is largely illusory.' However, barely two pages further in its opinion, the court held that it could not ignore

this 'potential benefit' in allowing an award of counsel's full lodestar fees." Defendant/Appellant's Application for Transfer, at 7-8 (quoting Op. at 11-12, 14).

As Volkswagen's counsel has correctly explained, "[p]otential recovery, which the Court of Appeals held was 'not the measure of the degree of success' in awarding a multiplier, cannot simultaneously be supportive of a lodestar free 24.6 times the action relief afford to class members." *Id*. at 8. "There can only be one value for a "money-only" claims made settlement, namely the relief actually recovered." *Id*. PLAC agrees. This Court should so hold.

IV. ARBITRARY AND EXCESSIVE FEE AWARDS SUCH AS THE ONE HERE UNDERMINE THE INTEGRITY OF THE COURTS, RAISE CONSTITUTIONAL DUE PROCESS CONCERNS, AND MAY INVITE INTERVENTION BY THE LEGISLATURE AND UNITED STATES SUPREME COURT.

It would shock the conscience of any ordinary citizen in Missouri to learn that Class Counsel believe they are "entitled" to a doubled lodestar fee of $6,174,640—$1,300 per hour for lead counsel, $750 for an associate, and $392 for paralegals—plus $550,00 in expenses and assessed court costs against Volkswagen and additional attorney fees on appeal, to obtain $125,261 for their clients. The clients themselves would likely be appalled. Tellingly, we understand that of the 20,137 notices presumed to have reached their intended addresses, members of the settlement class submitted a total of 177 claim forms, of which less than 150 required payment or free repairs by Volkswagen—reflective of the value many if not most of the class members placed in the action to begin with.

This Court should reduce the attorney's fee in this action to help preserve the integrity of the courts and the civil justice system. As the Second Circuit Court of Appeals said with regard to federal Rule 23 class actions: "For the sake of their own integrity the integrity of the legal profession and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974).

Furthermore, an arbitrary and excessive attorney fee award may raise constitutional due process concerns. In a series of decisions, the United States Supreme Court has held that punitive damages awards must satisfy the procedural and substantive requirements of the Due Process Clause of the U.S. Constitution. *See BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The due process precepts of these decisions should apply to protect defendants against other arbitrary deprivations of property by the state, including through fee-shifting statutes. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause…was intended to secure the individual from the arbitrary exercise of the powers of the government."); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("While *State Farm* dealt with punitive damage awards, the due process concerns articulated in *State Farm* are arguably at play regardless of the label given to damage awards.").

This Court and other state courts that approve arbitrary and excessive attorney fee awards may invite a backlash. As Fourth Circuit Judge Paul Niemeyer explained with

respect to pain and suffering awards, another area of the law that is prone to arbitrariness,[4] "[t]he relevant lesson to be learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004). Judge Niemeyer was warning states that if they do not rein in excessive noneconomic damages awards the United States Supreme Court may step in and impose constitutional mandates, as the Court did with respect to punitive damages awards.[5] The same reasoning applies with respect to fee-shifting awards; failure to rein

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[4] *See also* Mark Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DePaul L. Rev. 331, 333 (2006) ("the Court in *State Farm*…identified four different constitutional 'concerns' that justify constraining those awards as a matter of due process. Each of these concerns also applies to pain-and-suffering damages, implying that due process also constrains these tort awards.").

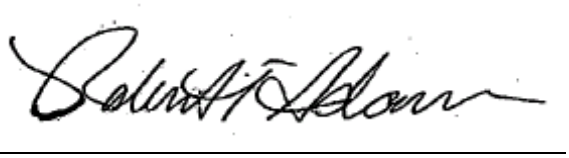
[5] *See also* Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y 231 (2003) (stating that "in response to a concern that traditional modes of review were increasingly failing to reign in 'runaway' punitive damages awards, the Court has dramatically increased the scope of judicial involvement in reviewing punitive damages awards for excessiveness," and arguing "the due process principles that have informed the Court's punitive damages

in excessive fee awards under the MMPA may invite intervention by the Missouri legislature and perhaps by the United States Supreme Court.

CONCLUSION

For these reasons, PLAC urges the Court to reduce and remit the attorney's fee award.

Respectfully submitted,



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decisions require similarly enhanced procedural safeguards with respect to noneconomic compensatory damages.").

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Dated: October 12, 2012

RULE 84.06(C) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) contains 4,602 words, as calculated by the Microsoft Word software used to prepare this Brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing and attachments were served through the Missouri Supreme Court electronic filing system on October 12, 2012, to:

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APPENDIX A

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Product Liability Advisory Council

as of 10/12/2012
Total: 101

3M
Altec, Inc.
Altria Client Services Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products,
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Chrysler Group LLC
Cirrus Design Corporation
CLAAS of America Inc.
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.
Engineered Controls International,
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors LLC
GlaxoSmithKline
The Goodyear Tire & Rubber
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America,
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America,
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.

Corporate Members of the
Product Liability Advisory Council

as of 10/12/2012

Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic Corporation of North
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America,
Teva Pharmaceuticals USA, Inc.
Thor Industries, Inc.
TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.